UNITED ASIAN BANK BHD.

v.

PEMBANGUNAN FARLIM SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[SUIT NO. C 1043 OF 1982]
11 JULY 1984

CIVIL PROCEDURE: *Application for stay of proceedings - Loan secured by debenture, charge and guarantee - Creditor enforcing guarantee without first proceeding against the debenture and charge - Whether abuse of process of Court - Whether defendants protected by equity.*

The plaintiff Bank lent money to the 1st defendant, a company, for the purpose of developing the company's land in Raub, Pahang into a housing estate. The loan was secured by debenture, creating a floating charge, a first fixed charge and a joint and several guarantee by the 2nd, 3rd and 4th defendants, who were directors of the company. Although certain payments were made, as at 31 May 1982, over RM3,000,000 were still owing and the plaintiff Bank caused a writ to issue against the defendants for the amount owing. The defendants appeared to the writ and caused statements of defence to be filed and served. The plaintiff Bank however sought summary judgment, whereupon the 2nd, 3rd and 4th defendants applied for a stay of the proceedings until after the plaintiffs had enforced their rights under the debenture and the charge on the lands.

Held:

The stay of proceedings must be refused. In all the circumstances of the case, the plaintiff Bank in exercising its option and calling upon the guarantors to make good the money without resorting to its rights under the debenture and the charge was not in any way an abuse of the process of Court. The onus of demonstrating that there was an abuse of the process of Court is on the party making the allegation and in the instant case, the 2nd, 3rd and 4th defendants had failed to discharge that burden. In the circumstances of the case, there was no equity in favour of the defendants. In fact, the purchasers of the subdivided land which had been charged had rights which had perhaps in law and certainly in equity to be protected, *(Ng Yik Seng & Anor. v. Perwira Habib Bank* [1980] 2 MLJ 83 distinguished).

[Application dismissed with costs.]

Cases referred to:

Wolmershausen v. Gullick [1893] 2 Ch 514
Jackson v. Digby [1854] 2 WR 540
Ewart v. Latta [1865] 4 Macq. HL 983
Ng Yik Seng & Anor. v. Perwira Habib Bank [1980] 2 MLJ 83

For the plaintiffs - Joginder Singh; M/s Joginder Singh & Co.
For the defendants - Ramesh Chandra Sanghvi; M/s Kassim Tadin, Wai & Co.

JUDGMENT

VC George J:

The 1st defendant is a company that owns land in Raub, Pahang which land had been subdivided into 223 lots, for the purpose of the 1st defendant developing the area into a housing estate and for which purpose the plaintiff Bank in 1976, lent the 1st defendant just over RM2 million on the following securities.

(i) A debenture dated 17 March 1976 by the 1st defendant creating a floating charge in favour of the Bank in respect of all the 1st defendant's undertaking and assets.

(ii) a first fixed charge dated 6 April 1976 on the said 223 lots, and of RM2 million, by the 2nd, 3rd and 4th defendants who at all relevant times.

(iii) a joint and several guarantee up to the limit in respect of the principal amount of RM2 million, by the 2nd, 3rd and 4th defendants who at all relevant times were directors of the 1st defendant company.

Out of the 223 lots 81 had been redeemed leaving 142 lots still charged to the Bank, which lots according to the 2nd defendant are worth some RM6 million.

The loan carried interest at certain agreed rates and although certain repayments had been made, as at 31 May 1982 according to the plaintiff Bank there was owing to the Bank RM3,335,832.48. Notices of demand were sent to the defendants and on 4 June 1982 the plaintiffs caused a writ to issue against them for that amounts, interest and costs.

The defendants appeared to the writ and caused Statements of Defence to be filed and served. The plaintiffs however sought summary judgment which application has not been heard as yet because the 2nd, 3rd and 4th defendants moved the Court for a stay of all proceedings as against them and each of them until after the plaintiffs had enforced their rights under the debenture and the charge on the lands. The stay was refused and the 2nd, 3rd and 4th defendants have appealed against my dismissal of the application. What follows are the grounds for the dismissal.

The arguments by and advanced for the defendants were that the bank is entitled to and should pursuant to the debenture appoint a Receiver and Manager of the undertakings and assets of the 1st defendant "to take such steps as may be necessary to dispose of the assets of the 1st defendant towards satisfaction of the amount owing..." It was further contended that it was a simple enough task for the Bank to foreclose on the charges in respect of those remaining 142 lots and by the forced sale of the lands the amounts owing would be realised. It was argued that the Bank should exhaust its remedies as per the debenture and the charges before it invoked the guarantee. To invoke the guarantee and to sue on it at this stage without first enforcing the debenture and having the lands sold by foreclosure proceedings was, it was contended, an abuse of the process of Court.

Encik Ramesh Chandra Sanghvi of counsel for the 2nd, 3rd and 4th defendants submitted that:

> "the surety also has an equity against the creditor to prevent the creditor from bringing down the whole weight of the debt upon the surety".

Reference was made to *Rowlatt on Sureties* from p. 132 of which the above quotation is taken. The learned authors of Rowlatt relied on *Wolmershausen v. Gullick* [1983] 2 Ch 514 but they conceded that in the face of *Jackson v. Digby* [1854] 2 WR 540 and *Ewart v. Latta* [1865] 4 Macq. HL 983 the best that could be said on the matter was that it is "still arguable" that a surety at least in special circumstances has an equity to stay a creditor attempting unfairly to place the whole burden of the debt on the surety. Examples given are where there is a solvent principal debtor or solvent co-sureties who could easily be joined or a security which could easily be realised to pay the debt. It is useful to remember that *Ewart v. Latta* is a decision of the House of Lords where the underlying principle is that a surety in default cannot dictate terms to the creditor. The case involved Scottish law but it was said that the same principle would apply in English law.

Encik Sanghvi also referred to the Federal Court judgment in *Ng Yik Seng & Anor. v. Perwira Habib Bank* [1980] 2 MLJ 83 where Chang Min Tat FJ in delivering the judgment of the Court took the view that where realisation of the legal charge on a parcel of land was readily available and which could provide sufficient amounts to meet the debt the contention that the guarantors should not be called upon to meet their guarantee until after the sale pursuant to foreclosure proceedings, was not without attraction. The learned Federal Judge was speaking *obiter*. However he went on to state that it was clear to the Federal Court that in the circumstances obtaining in that case

> an action to obtain judgment against the guarantors which would open avenues of execution to the chargee and even bring the guarantors into the Bankruptcy Court when in the final accounting, the appellants needed not to be called to honour their guarantee, would be an abuse of the process of the Courts.

The underlying principle is that the Court abhors useless litigation and will stay or even dismiss proceedings "so as to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation". The Court can and will stop an abuse of its process. And there can even be an interference with the exercise of the options available to a creditor to realise the amounts owing to him by invoking the inherent equitable jurisdiction of the Court to prevent an abuse of the process of Court. But in this context the litigation complained against has to amount to a piece of frivolous, vexatious or hopeless or useless litigation before it can be held out to be an abuse of the process of Court which calls for interference by the Court.

The onus of demonstrating that there is an abuse of the process of Court is of course on the party making the allegation. In the instant case, the 2nd, 3rd and 4th defendants in moving the Court for a stay failed to discharge this burden.

The 1st defendant having entered into agreements with various purchasers (or stepped into the shoes of the vendor) for the sale of houses and shops apparently ran into serious problems. I have not been able to gather whether they were problems of management (or mismanagement), of finance or of bureaucracy or whether it was a combination of all these three. But the outcome appeared to be that the work on the project had come to a standstill. This was denied by the 2nd defendant. However, my attention was drawn to the valuation report by W.M. Malik & Lee obtained at the instance of the 1st defendant which is Exhibit GD15 to the affidavit of George Daniel affirmed on 13 September 1983. In that the valuers point out "that construction work on site have not been in progress for a considerable period of time and the site was partially overgrown with lallang and dense shrubs."

My attention was also drawn to the fact that a significant number of the lots charged to the Bank had been sold to purchasers who had made substantive payments to the 1st defendant. In the face of that for the defendants to invoke equity to turn the heat off them seemed to me to take the cake. They want relief at the expense of the men on the street to whom they (or their predecessors in title) have sold the lots! In my judgment all those purchasers of lots have rights that have perhaps in law and certainly in equity to be protected. In any event, unlike the *Ng Yik Seng & Anor. v. Perwira Habib Bank* case where there was apparently an uncomplicated charge of a single lot of land by the owners in possession, here we have the complications of a partially completed housing estate, with dissatisfied purchasers, contractors, subcontractors and so on to contend with. It seems to me that going against the land would result in the Bank opening a Pandora's box!

The bank in lending the money had in an abundance of caution provided itself with more than one form of security. Events show that their abundance of caution was justified. In all the circumstances of this case I was of the view that the bank in exercising its option and calling upon the guarantors to make good the money without resorting to its rights under the debenture and the charge was not in any way an abuse of the process of Court. The application for a stay of the proceedings had to be and was dismissed with costs.

Also found at [1985] 1 CLJ 295